

KEWANGAN BERSATU BHD*a*

v.

YAP AH YIT & ORS

HIGH COURT MALAYA, SHAH ALAM

b

FAIZA TAMBY CHIK J

[SUIT NO: 22-285 OF 1996]

15 JUNE 1998

LIMITATION: *Accrual of cause of action - Failure to repay loan - Letters of demand sent - Actions instituted more than six years ago - When did cause of action accrue - Application for default judgment filed more than six years after first letter of demand - Whether application time barred - Whether delay amounted to waiver of right to claim - Sale of charged property - Whether new cause of action arose*

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CIVIL PROCEDURE: *Judgment - Default of defence - Setting aside - Failure of solicitors to file defence in time - Subsequent change of solicitors - Whether client should be penalised for solicitor's negligence - When default judgment can be set aside as of right*

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LEGAL PROFESSION: *Professional discipline - Practice and Etiquette Rules - Failure to give seven days notice prior to entering judgment in default - Legal Profession (Practice and Etiquette) Rules 1978, r. 56*

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CIVIL PROCEDURE: *Judgment - Default of defence - Claim for liquidated demand - Preparation of judgment - Whether draft judgment must be submitted for approval - Distinction between claim for liquidated demand and claim for unliquidated damages - Rules of the High Court 1980, O. 19 r. 2(1), O. 19 r. 3, O. 42 r. 8*

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As a result of a failure to abide by a loan agreement entered between the parties, the plaintiff sent a first letter of demand to the defendants followed by subsequent letters of demand. The defendants failed to respond and thus the plaintiff began several actions against the defendants, the earliest of which was filed on 13 March 1987. On 31 June 1996, the plaintiff successfully applied for judgment in default of defence. Prior to entering judgment in default of defence, the plaintiff sold off the property charged to it as security for the loan and realised a portion of the amount owing to it.

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This application by the defendants was to set aside the said judgment in default. The defendants submitted that the judgment in default was irregular and ought to be set aside as of right based on three grounds. Firstly, that the plaintiff's claim was time barred as the cause of action accrued and the

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a limitation period began to run when the defendants failed to abide by the first letter of demand ie, before the filing of the first action by the plaintiff on 13 March 1987. Thus, it contended that the application for judgment in default was filed out of time.

b The second issue raised was that the plaintiff's solicitors were in breach of r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978 ('LPR') in that they had failed to provide the seven days' notice of their intention to enter judgment in default of defence to the defendants' solicitors or to the defendants. It was argued that the notice was given to the defendants' earlier solicitors and not to their present solicitors despite notice of change of solicitors being filed and served on the plaintiff's solicitors.

c Lastly, the defendants contended that the plaintiff, contrary to O. 48 r. 8(1) of the Rules of the High Court 1980 ('RHC'), failed to send a draft judgment to the defendants' solicitors for their approval despite being aware that there were solicitors on record for the defendants.

d **Held:**

[1] A default judgment can only be set aside as of right where the procedural steps laid down under the RHC have not been complied with.

e [2] The cause of action accrued and limitation started to run before 13 March 1987 ie, when the defendants failed to make payments for the installments, as claimed by the plaintiff and whereupon the plaintiff filed the first summons. In the circumstances, the present action was time barred. The issue that the plaintiff had sold off the property charged to them and were now claiming for the balance outstanding did not mean that a new cause of action had accrued or that the limitation period had stopped running or that a continuing cause of action had arisen.

f [3] Due to the plaintiff's delay in commencing any action against the defendants, the plaintiff was now estopped and barred from commencing any action against the defendants based on the said cause of action. This delay had indirectly led to the plaintiff waiving its rights to claim against the defendants.

g [4] Rule 56 of the LPR does not have the force of law. Nevertheless, it is good professional practice to adhere to it. A breach of the rule would attract the displeasure and censure of the members of the Bar generally. The making of rules for regulating professional practice and etiquette is provided under Part VI of the Legal Profession Act 1976 ('LPA') which is an act consolidating the law relating to the legal profession in Malaysia. Section 77(3) of the LPA provides that any advocate and solicitor who fails to comply with any rules made under this section

h (ie, Part VI) may be liable to disciplinary proceedings.

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- [5] The judgment in default of defence was entered due to the defendants' earlier solicitors' failure to file a defence within the time provided. The defendants changed their solicitors immediately upon realising this fact and this showed that they intended to defend and did in fact have a defence to the plaintiff's action. a
- [5a] The court will not allow a client to suffer for the negligence of his solicitors. In this case, the court would not penalise the defendants because of the negligence of their solicitors. b
- [6] Under O. 19 r. 2(1) of the RHC, the judgment obtained is a final judgment with an absolute and ascertained sum. However, under O. 19 r. 3 of the RHC, the judgment obtained is only an interlocutory judgment with damages to be assessed at a later date. A defendant who has been subjected to a judgment under O. 19 r. 3 of the RHC may still be able to defend himself during the hearing of the assessment of damages in regard to quantum. This opportunity is not open to a defendant who has been subjected to a judgment obtained under O. 19 r. 2(1) of the RHC. This is why a draft judgment is not as necessary in an O. 19 r. 3 judgment as compared to an O. 19 r. 2(1) judgment. c
- [6a] A judgment under O. 19 r. 2(1) of the RHC is one obtained without hearing the merits of the case and a plaintiff's counsel having notice of a defendant's counsel on record, has a duty *vide* O. 42 r. 8(1) of the RHC to forward a draft judgment for approval before proceeding in the preparation and filing of the sealed judgment pursuant to O. 42 r. 10 of the RHC. There is a statutory obligation on the part of the solicitors for a plaintiff to file a draft judgment under O. 42 r. 8 of the RHC. d
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[Application allowed with costs.]

Cases referred to:

- Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1 (**foll**) g
- Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 329 (**dist**)
- Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 (**foll**)
- Malaysia National Insurance Sdn Bhd v. Tan Kong Ming* [1997] 3 CLJ Supp 121 (**foll**)
- Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 2 MLJ 1959 (**foll**) h
- Re McHenry McDermott v. Boyd* [1894] 3 Ch 290 (**refd**)

Legislation referred to:

- Legal Profession Act 1976, s. 77(3)
- Legal Profession (Practice and Etiquette) Rules 1978, r. 56
- Limitation Act 1953, s. 6(1)(a) i
- Rules of the High Court 1980, O. 18 r. 19, O. 42 rr. 8(1), 10, 13, O. 19 rr. 2(1), 3, 9

- a* For the plaintiff - M/s Shuhaiza Jasbinder & Lim
For the defendants - M/s Arbain, Chan, Chew & Assoc

Reported by Cindy Chan

JUDGMENT

- b* **Faiza Tamby Chik J:**

This is the first and second defendant's application in encl. 14 to set aside the judgment-in-default of defence entered against them on 2 July 1997.

- c* The plaintiff entered judgment in default of defence against the first and second defendants on 2 July 1997. The plaintiff submitted that the judgment obtained is regular. However, the first and second defendants submitted that the judgment is irregular. It should be set aside as of right on the following grounds:

- d* i) that the plaintiff's claim is time barred;
- ii) that the plaintiff has failed to provide the 7 days notice to the defendants' solicitors when entering the judgement in default of defence; and
- e* iii) that the plaintiff has failed to send the draft judgment to the defendants solicitors for their approval.

The default judgment could only be set aside as of right where the procedural steps laid down under the Rules of the High Court 1980 have not been complied with. In *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 MLJ 40 Lee Hun Hoe CJ (Borneo) at p. 41 said:

- f* Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to hear on the merits.

- g* And the plaintiff submitted that the only procedures in issue are:

- (i) that of the 7 days notice; and
- (ii) that the draft judgment was not forwarded to the defendants' solicitors for their approval.

- h* It is obvious that the plaintiff had begun a number of actions against the defendants based on the same cause of action with the present suit whereby the said judgment-in-default of defence was obtained, ie, based on the defendants' failure to abide the loan agreement dated 4 October 1984 (See
- i* exh. YAY-2 encl. 14). The plaintiffs earliest action was filed on 13 March 1987 *vide* summons no: 62-1467-87 in the Sessions Court Kuala Lumpur. The defendants submitted that the cause of action accrued and the limitation period

began to run when the defendants failed to abide by the first letter of demand that was sent then and not subsequent letters sent at any other later time. Even though in this present case it is not clear when the first letter of demand was sent as both earlier summons in exh. “YAY2” in particular para. 11, did not explain the date when the letter of demand was sent to the defendants, the cause of action must have accrued much earlier before 13 March 1987, that is when the defendants failed to abide by the first letter of demand sent.

The Plaintiff's Claim Is Time Barred

The defendants' first issue is that this present action was filed on 31 June 1996 and based on that fact the cause of action accrued before 13 March 1987, consequently it is obvious that this present action has been filed almost nine years after the cause of action accrued. Section 6(1)(a) of the Limitation Act 1953, *inter alia* provides that:

6(1) ... actions shall not be brought after the expiration of six years from the date on which the cause of action accrued that is to say:

(a) action founded on a contract ...

In the case of *Malaysia National Insurance Sdn Bhd v. Tan Kong Ming* [1997] 3 CLJ Supp 121 at p. 131, in deciding on the issue of limitation, reference was made to the case of *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 2 MLJ 1959 whereby the Federal Court in the latter case held that:

... the cause of action accrued the instant the mining company failed to pay the first installment due and therefore the action was barred by limitation, the action being commenced more than six years after the cause of action arose.

Suffian LJ in deciding that case referred to the decision of Lindley LJ in *Reeves v. Butcher* [1891] 2 QB 509, 511:

The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

Three years later a similar problem arose in the Court of Appeal in *In re McHenry McDermott v. Boyd* [1894] 3 Ch. 290. There a man borrowed money. First, he undertook to pay the lender in February 1883. Secondly, he deposited securities which the lender was authorised to sell if the loan was not paid, and undertook to pay the difference if the proceeds of the sale were not enough to pay the debt. The borrower paid one amount in February 1884, and nothing thereafter. In 1889 the lender sold the securities. The proceeds were not enough to pay the debt. So he sued to recover the difference. The court held that he was barred by the statute of limitation. It was argued on behalf of the lender that time began to run against the lender only from 1889, when the securities were sold and the actual amount payable by the borrower was ascertained;

a that it was its second part that gave rise to the claim, namely for the difference between the proceeds of sale and the original advance; and that that difference, and consequently the cause of action, was not ascertainable until 1889. Lord Herschell LC rejected this argument, saying at p. 293:

b I cannot say that that right of realisation gave a new, separate, and independent cause of action, so that the statute did not begin to run until from that date. The truth is that the debt is one debt only.

Lindley LJ was also a member of the court then, and he said at p. 295:

c The realisation of the security does not add to the cause of action; the cause of action accrued long before.

d Therefore it is obvious in this case that the cause of action accrued and limitation period started to run before 13 March 1987 ie, when the defendants failed to make payments for the installment as claimed by the plaintiff and whereby the plaintiff carried on the action with filing of the first summons. In the circumstances the present action is time barred. The issue that the plaintiff had sold off the property charged to them in 1992 and are now claiming for the balance outstanding, does not mean that a new cause of action has accrued or that the limitation period has stopped running or a continuing cause of action arose.

e In *Malaysia National Insurance Sdn Bhd v. Tan Kong Min (supra)* the court stated "In line with the thinking of Lindley LJ in *In re Mc Henry (supra)* I hold that the promise to pay the deficiency (after conclusion of auction sale and realisation of proceeds) does not create a new obligation to pay; it only applies to the old obligation but to a reduced sum. The realisation of the security being the charged property, does not add to the cause of action, the cause of action having already accrued on 26 September 1986."

f Further, exh. "YAY-1" para. 13 in encl. 14 does not merit the accrual of a new cause or action. The said letter dated 20 March 1988 does not in any way refer to the present debt and the defendants did not make any admission or acknowledgement regarding the present debt. Thus, the said letter does not create a fresh accrual of the cause of action. In any event, it is the defendants' submission that the said letter is invalid as the same is time barred. The plaintiff have failed to prove that the defendants have agreed to pay any balance which would occur due to the sale of the said property. Therefore, due to the plaintiff's delay in commencing an action against the defendants, the plaintiff is now estopped and barred from commencing any action against the defendants based on the said cause of action. This delay has indirectly led to the plaintiff waiving their rights to claim against the defendants. In *Malaysia National Insurance Sdn Bhd v. Tan Kong Ming at (supra)* at p. 122, it was held that:

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The conduct of plaintiff in delaying the enforcement of its right clearly calls for the application of the equitable doctrine of laches. The maxim *vigilantibus et non dormientibus lex succurrit* ought to apply. It is unjust to give the plaintiff a remedy where it has by its conduct done that which might fairly be regarded as equivalent to a waiver of it.

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It is the defendants' submission that the said judgment-in default of defence is irregular and therefore, invalid and not binding on the defendants and ought to be set aside as of right as the plaintiff's claim has been time barred and it is the defendants' submission that this is also a valid statutory defence.

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In the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 AMR 846, at p. 852 the Court of Appeal said:

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The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 AMR 215. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p. 225):

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The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitia*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made:

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(a) with reasonable promptitude, in other words within a reasonable time and

(b) before the defendant has taken any fresh step after becoming aware of irregularity. (See O. 2 r. 2(i) of the Rules of High Court 1980).

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In his case O. 42 r. 13 of the Rules of the High Court 1980 has been followed whereby it requires that:

Where in these Rules provisions are made for setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make this application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

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It is observed that the said judgment-in default of defence has been served on the second defendant and the defendants' present solicitors on 6 August 1997 and the summons in chambers to set aside the said judgment-in default of defence was filed and served on the plaintiffs' solicitors on 18 August 1997, within the time provided.

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- a* The defendants' second issue is that whilst the existence of exh. "SMS-1" is not denied, the fact disputed is that the said notice was given to the defendants' earlier solicitors, and that the defendants' present solicitors, M/s Arbain Chandra Chew & Associates was not given any notice of the plaintiff's solicitors intention to enter a judgment by default of defence against the defendants. Therefore, it is the defendant's submission that the plaintiff's solicitors failed to give the seven days notice to the present solicitors or to the defendants and therefore, breaching r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978. Rule 56 reads:
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- c* Where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleading or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-name advocate and solicitor.
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- e* I am of the view that r. 56 does not have the force of law nevertheless it is good professional practice to adhere to it; the breach of which would attract displeasure and censure from the members of the Bar generally. It must be borne in mind that the making of rules for regulating the professional practice and etiquette is provided under Part VI of the Legal Profession Act 1976 (LPA) which is an act to consolidate the law relating to the legal profession in Malaysia. Under s. 77(3) of LPA it is provided that any advocate and solicitor who fails to comply with any rules made under this section (ie, Part VI) may be liable to disciplinary proceedings. It is a fact that any advocate and solicitor who has been disciplined under the rules does not speak volumes or well for himself in his practice.
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- g* Further it is obvious that the said judgement-in-default of defence was entered due to the defendants earlier solicitors' failure to file the defence within the time provided for. In the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 AMR 846 the Court of Appeal held that:

- h* The explanation of the appellant that the delay was caused by his solicitor was not a reasonable explanation. Although a court will not allow a client to suffer for the negligence of his solicitor, there are limits to what may be done in the interests of justice. The facts and circumstances indicate that the appellant did not communicate with his solicitor earlier to discover the state of the case against him. This indifference should not adversely affect the plaintiff.
- i* Furthermore, the plaintiff's solicitors had granted the appellant's solicitors every indulgence in relation to the delivery of pleadings (see p. 852 Line 22 – p. 853 Line 5)

Therefore the court will not allow a client to suffer for the negligence of his solicitor. And in this case the court will not penalise the defendants because of the negligence of their solicitors. Furthermore, the defendants have changed their solicitors immediately upon realising this fact and this shows that the defendants intend to defend and do in fact, have defence in this action. The summons in chambers to strike out the plaintiffs' claim under O. 18 r. 19 of the Rules of the High Court 1980 and the notice of change of solicitor were filed on 2 July 1997 and served on the plaintiffs' solicitors on the same day; the day the said judgment-in-default of defence was entered.

The third issue refers to para. 9 of the plaintiff's statement of claim dated 31 July 1996 whereby the plaintiff failed to take into account the sum of the sale price of the said property which was sold at RM70,000 and therefore, the sum claimed by the plaintiff is in fact in excess of the actual amount owed. Hence the said judgment-in-default is irregular. Para 9 of the statement of claim states that a sum of RM149,229.34 as "bayaran ansuran" which means payment of installments. This does not in any way indicate or prove any sum of the sale price, as claimed by the plaintiffs.

The fourth issue is that the plaintiff's solicitors have failed to abide by O. 42 r. 8(1) of the Rules of the High Court 1980, which provided that:

where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party ...

It is submitted that the plaintiff's solicitor have in fact knowledge that there were solicitors on record on behalf of the defendants and yet, they failed to abide by the said rule and send a draft copy to them. Under O. 19 r. 2(1), the judgment obtained is a final judgment with an absolute and ascertained sum. However, under O. 19 r. 3, the judgment obtained is only a interlocutory judgment with damages yet to be assessed at a later date. As such, there is a difference in obtaining a judgment under the two said Orders. A defendant who has been subjected to a judgment under O 19 r. 3 may still be able to defend himself during the hearing of assessment of damages in regard to the quantum payable. This opportunity is not open for a defendant who has been subjected to a judgment obtained under O. 19 r. 2(1). Thus, the reason why a draft judgment is not as necessary in a O. 19 r. 3 judgment compared to a O. 19 r. 2(1) judgment as provided for under the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 329; [1994] 1 MLJ 312 which is relied on by the plaintiffs.

- a* For reasons stated above, it is not therefore proper for the plaintiffs' counsel to suggest that O. 19 r. 3 is in *pari materia* with O. 19 r. (1). Further, a judgment under O. 19 r. 2(1), as in the present case, has been obtained without hearing the merits of the case and the plaintiff's counsel, having notice, in particular, of defendants' counsel on record has a duty *vide* O. 42 r. 8(1) to
- b* forward a draft judgment for approval before proceeding in the preparation and filing the sealed judgment pursuant to O. 42 r. 10. Thus, the plaintiffs counsel's submission that O. 42 r. 8(1) is not applicable to them in this case is misconceived. There is a statutory obligation on the part of the solicitors for the plaintiff to file a draft judgment under O. 42 r. 8.
- c* It is my view that the basic principle is that as long as a counsel has notice of the fact that there is an opposing counsel on record, there lies a duty under the ethical rule an obligation for either counsel to forward any draft order whatsoever for the opposing counsel's approval and to give due notice, which in this case the plaintiffs' counsel have failed to abide by.
- d* Lastly the fifth issue is that the said judgment-in-default of defence had been entered as a result of the defendants' failure to comply with a procedural step ie, to file in a defence within the time provided. And the court has an absolute discretion to set aside such a judgment.
- e* In *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 MLJ 40 the Supreme Court held that:
- Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment on terms and allow the
- f* case to be heard on the merits.
- And moreover O. 19 r. 9 of the Rules of the High Court 1980 provides that:
- the court may, on such terms as it thinks just, set aside, ... any judgment entered in pursuant to this order.
- g* Under the circumstances I see no ground why I should not decide in favour of the defendant. I therefore make an order in terms of encl. 14.

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